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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted]. 56

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION and GENERAL MOTORS CORPORATION, *Petitioners,*

and

THE UNITED STATES OF AMERICA

v.

ROBERTA BARRACK, Admx., etc., et al.,
SIDNEY W. POPKIN, et al.,
HOWARD H. RAPP, Admr., etc., et al.,
LEAH BIERNBAUM, Extrx., etc., et al.,
DORIS A. LAISTER, Extrx., etc., et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 738.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION AND GENERAL MOTORS CORPORATION,

Petitioners,

and

THE UNITED STATES OF AMERICA,

v.

ROBERTA BARRACK, ADMX., ETC., ET AL.,
SIDNEY W. POPKIN, ET AL.,
HOWARD H. RAPP, ADMR., ETC., ET AL.,
LEAH BIERNBAUM, EXTRS., ETC., ET AL.,
DORIS A. LAISTER, EXTRX., ETC., ET AL.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This reply brief is made necessary by the withdrawal by the Court of Appeals of an express holding as to two of

these cases after the Petitions for Certiorari[1] were filed with this Court and by respondents' reliance on grounds for affirmance which were not ruled on by the Court of Appeals.

The change in the opinion below emphasizes the importance of the question involved by clearly demonstrating that the court's ruling applies to Section 1406(a) of the Judicial Code as well as to Section 1404(a). The Court of Appeals had previously ruled that two of these cases must be transferred to Massachusetts under 1406(a), since venue was improper in Pennsylvania (Petition, Appendix B, p. 29a), although it held that transfer could not have been made under 1404(a). After petitioners suggested that the Court's ruling was equally restrictive of 1406(a) (Petition No. 738, p. 11; Petition No. 851, p. 13), the Court of Appeals, at respondents' request, removed this inconsistency by withdrawing the court's holding directing transfer of these two cases.[2] It is now therefore indisputable that the court's restrictive interpretation of the "might have been brought" requirement of 1404(a) equally limits transfer under 1406(a).

Some of the respondents contend that certiorari should be denied because the resolution of issues not reached by the Court of Appeals requires affirmance. They claim that if the cases are tried in Pennsylvania plaintiffs might be able to recover full compensatory damages against the corporate defendants, but will be able to recover only a maximum of $20,000 against them if the cases are tried in Massachusetts.

This contention is baseless. Two established principles of law each insure that the measure of damages will be the same irrespective of whether the cases are tried in Pennsylvania or Massachusetts.

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1. A Petition for Certiorari has also been filed on behalf of the United States, No. 851, October Term, 1962.

2. The order, dated February 21, 1963, is printed in Appendices to Respondents' Briefs.

First, the transferee district is required to apply the law of the transferor district, including its choice-of-law rules, in the trial of a case transferred under 1404(a). *H. L. Green Co., Inc. v. McMahon*; 312 F. 2d 650 (2d Cir. 1962); *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950); *Gomez v. The S. S. Dorothy*, 183 F. Supp. 499 (D. Puerto Rico 1959); *Hargrove v. Louisville & N. R. R.*, 153 F. Supp. 681, 684 (W. D. Ky. 1957); *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410, 414 (D. N. M. 1949).

The second is the rule of Pennsylvania law that the statutory law of the place of the injury determines whether a cause of action for wrongful death arises [3] and that the measure of the damages is a substantive matter governed by the wrongful death statute of the place of injury.[4] This rule is in accord with the Restatement, Conflict of Laws, §§ 384, 412, 417, 391 Comment (d). The Court of Appeals for the Third Circuit has applied this rule,[5] and has held specifically that a limitation on recovery to a maximum sum of $15,000 under the statute of the place of the injury was correctly applied by the District Court for the Eastern District of Pennsylvania.[6] Further, the Supreme Court of Pennsylvania has held that the Constitution and public policy of Pennsylvania have no extra-territorial force to create a cause of action even in favor of a Pennsylvania resident against another Pennsylvania resident, and that plaintiffs have no cause of action where none exists under the *lex loci delicti*.[7] Thus regardless of whether the cases

3. *Marson v. McElhinney*, 370 Pa. 622 (1952); *Foley v. The Pittsburgh-DesMoines Co.*, 363 Pa. 1, 9 (1949); *Smith v. Pennsylvania R. R.*, 304 Pa. 294 (1931); *Hoodmachar v. Lehigh Valley R. R.*, 218 Pa. 21 (1907); *Usher v. West Jersey R. R.*, 126 Pa. 206 (1889).

4. *Rodney v. Staman*, 371 Pa. 1 (1952); *Rennekamp v. Blair*, 375 Pa. 620, 621, 622 (1954).

5. *Knecht v. United States*, 242 F. 2d 929 (3d Cir. 1957); *Curtis v. Campbell*, 76 F. 2d 84 (3d Cir. 1935), cert. denied, 295 U. S. 737 (1935).

6. *Knecht v. United States*, 242 F. 2d 929 (3d Cir. 1957).

7. *Benarowicz v. Vetrone*, 400 Pa. 385 (1960).

are tried in Pennsylvania or Massachusetts, plaintiffs may recover only such damages as Massachusetts law allows.

Finally, respondents' suggestion that transfer is improper because of some possibility that there might be a difference in recoverable damages squarely conflicts with the decision of the Sixth Circuit in *Goranson v. Kloeb*, 308 F. 2d 655 (6th Cir. 1962). In that case the court approved an order transferring an action for the death of an Ohio resident from Ohio to the Eastern District of Virginia where the aircraft crashed, even though Virginia law limits recovery to $30,000 and the Ohio constitution expressly provides that there should be no limitation in the amount of recovery for wrongful death.

Respectfully submitted,

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